



Re: Request under the Freedom of Information Act -- EPA fee waiver initial determinations, May 18, 2013 to the date you process this request

Christopher Horner

to:

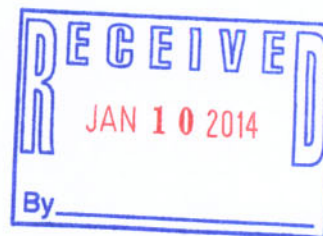
FOIA HQ

01/09/2014 04:14 PM

Hide Details

From: Christopher Horner <chris.horner@cei.org>

To: FOIA HQ@EPA



1 Attachment



CEI EPA 'Not Billable' May 13 to present FOIA I.pdf

Please note the correct request date is January 9, 2014 for the above-captioned request.

On 1/9/14 4:04 PM, "Christopher Horner" <chris.horner@cei.org> wrote:

To EPA's FOIA Office,

Please find the above-captioned request attached in PDF format.

If you have any questions please do not hesitate to contact me.

Best,

Chris Horner

202.262.4458 M



REQUEST UNDER THE FREEDOM OF INFORMATION ACT

January 9, 2014

National Freedom of Information Office  
U.S. EPA  
FOIA and Privacy Branch  
1200 Pennsylvania Avenue, N.W. (2822T)  
Washington, DC 20460

**Re: Request for Copies of “Not Billable” Fee Waiver Initial Determinations;  
alternately, for EPA’s Index of Fee Waiver responses given 5/18/13-present**

**BY ELECTRONIC MAIL:** [hq.foia@epa.gov](mailto:hq.foia@epa.gov)

EPA FOIA Officer,

On behalf of the Competitive Enterprise Institute (CEI), a non-profit public policy institute organized under section 501(c)3 of the tax code and with an active transparency practice including dissemination of public information obtained under open records and freedom of information laws, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 et seq., please provide us within twenty working days,<sup>1</sup> *either* 1) copies of all initial determinations, by EPA Headquarters FOIA office, dated from May 18, 2013 to the date you process this request, inclusive, which inform a FOIA requester its request is not billable or does not meet the required minimum to incur fees, *or* 2) EPA’s list of initial determinations on FOIA fee waiver requests

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<sup>1</sup> See *Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 186 (D.C. Cir. 2013), and discussion at pages 20-21, *infra*.

similar to that provided to requesters in EPA-HQ-2013-006574, EPA-HQ-2013-009087, EPA-HQ-2013-007003, EPA-HQ-2013-006821 ("EPA FOIA Fee Waiver List 2009-01-21 to 2013-05-17"), but for dates from May 18, 2013 through the date you process this request, inclusive.

We request EPA choose which of these responses/formats EPA determines is the quickest and easiest to provide. It previously provided us a compilation of the former, fee waived if after exceeding its permitted time to respond (EPA-HQ-2013-004176), and has demonstrated it can readily provide the latter. The latter might be quicker given the lack of review for personal information, which EPA may consider.

We request these records in electronic format.

Scope of Request, Background Explaining the Requested Records

We have recently experienced, and become aware that other similarly situated non-profit groups (*i.e.*, limited government, and/or challenging, questioning or drawing attention to the basis for and/or negative impacts of recently proposed environmental regulations) have experienced facially questionable or plainly improper fee waiver denials at the initial determination stage. At the same time, we have become aware of near-immediate turnaround and, regardless, near-automatic granting of fee waivers to provide records to environmentalist pressure groups at the same stage without attritional administrative and litigation obstacles.

This request, when satisfied, will update us and the public on EPA's fee waiver practices since it released the above-cited, voluminous inventory of fee waiver determinations to multiple requesters as we await a report by EPA's Inspector General into the allegations that spawned this public interest, which itself and significant media and congressional oversight attention were



prompted by EPA-HQ-004176.<sup>2</sup> That report will likely also generate significant public interest, and we know we will be asked to respond to it. This enables a fulsome discussion.

FOIA is identity- and motive-neutral, and no agency may discriminate among or disparately treat otherwise similarly situated requesting parties. Further, and as EPA generally is aware, FOIA's fee waiver provision was created specifically to ensure that non-profit interests do not have fee barriers placed in their way, impeding access to public records the examination and dissemination of which are their lifeblood. See the discussion of the relevant law on this, *infra*, which of late we have had serial occasion to lay out for EPA on appeal of improper fee waiver denials at the initial determination level, if apparently to no lasting avail.

With evidence in the public record of starkly disparate treatment of groups with different perspectives but which are otherwise similarly situated, the public particularly deserves to know whether EPA is singling out groups it does not perceive as friendly to EPA's agenda for discriminatory treatment, in the form of denying fee waivers, placing a barrier to access at minimum to delay and possibly denying access to public records.

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<sup>2</sup> See Letter from Hon. David Vitter, Ranking Member, S. Comm. on Env't & Pub. Works, Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov't Reform, Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Technology, to Hon. Arthur A. Elkins, Jr., Reg'l Adm'r, Inspector General, U.S. Env'tl. Prot. Agency (Feb. 7, 2013); *see also* Memorandum from Carolyn Copper, Asst. Inspector General, Office of Program Evaluation, U.S. Env'tl. Prot. Agency Office of Inspector General, to Malcolm D. Jackson, Asst. Adm'r and Chief Information Officer, Office of Environmental Information, U.S. Env'tl. Prot. Agency, *Notification of Evaluation of EPA's Freedom of Information Act Fee Waiver Process* (Jun. 19, 2013) available at [http://www.epa.gov/oig/reports/notificationMemos/newStarts\\_06-19-13\\_FOIA\\_Fee\\_Waiver\\_Process.pdf](http://www.epa.gov/oig/reports/notificationMemos/newStarts_06-19-13_FOIA_Fee_Waiver_Process.pdf). *See also* related Letter from Sens. David Vitter, Charles Grassley, James Inhofe, and Chmn. Darrell Issa to EPA Administrator Bob Perciasepe, May 17, 2013.

### Withholding and Redaction

Please identify and inform us of all responsive or potentially responsive records within the statutorily prescribed time, and the basis of any claimed exemptions or privilege and to which specific responsive or potentially responsive record(s) such objection applies.

EPA must release “factual content”. As the D.C. Court of Appeals noted, an agency must “describe the factual content of the documents and disclose it or provide an adequate justification for concluding that it is not segregable from the exempt portions of the documents.” *King v. Department of Justice*, 830 F.2d 210, at 254 n.28 (D.C. Cir. 1987). As an example of how entire records should not be withheld when there is reasonably segregable information, we note that at bare minimum basic identifying information (who, what, when, *e.g.*, To, From, Date, and typically Subject) is not “deliberative”. As the courts have emphasized, “the deliberative process privilege directly protects advice and opinions and *does not permit the nondisclosure of underlying facts* unless they would indirectly reveal the advice, opinions, and evaluations circulated within the agency as part of its decision-making process.” *See Mead Data Central v. Department of the Air Force*, 566 F.2d 242, 254 n.28 (D.C. Cir. 1977) (emphasis added).

Pursuant to high-profile and repeated promises and instructions from the president and attorney general we request EPA err on the side of disclosure and not delay production of this information of great public interest through lengthy review processes to deliberate which withholdings they may be able to justify.

This is particularly true for any information that EPA seeks to claim as reflecting (the oft-abused, per even Attorney General Holder) “deliberative process”, in the absence of any actual



formal EPA deliberation being underway truly antecedent to the adoption of an agency policy on the relevant matters (*see, e.g., Jordan v. DoJ*, 591 F.2d 753, 774 (D.C. Cir. 1978)). In fact, the likelihood of this is near zero., which is highly unlikely due to the nature of records that would be responsive to this request (initial determinations regarding fee waivers).

Therefore, if EPA claims any records or portions thereof are exempt under *any* of FOIA's discretionary exemptions we request you exercise that discretion and release them consistent with statements by the President and Attorney General, *inter alia*, that **"The old rules said that if there was a defensible argument for not disclosing something to the American people, then it should not be disclosed. That era is now over, starting today"** (President Barack Obama, January 21, 2009), and **"Under the Attorney General's Guidelines, agencies are encouraged to make discretionary releases. Thus, even if an exemption would apply to a record, discretionary disclosures are encouraged.** Such releases are possible for records covered by a number of FOIA exemptions, including Exemptions 2, 5, 7, 8, and 9, but they will be most applicable under Exemption 5." (Department of Justice, Office of Information Policy, OIP Guidance, "Creating a 'New Era of Open Government'").

Nonetheless, if your office withholds any portion of the requested records as exempt from disclosure, please inform us of the basis of any partial denials or redactions. In the event that some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable, non-exempt portions of the requested records. *See* 5 U.S.C. §552(b).

That means, for example, EPA must cease its ongoing pattern with CEI of over-broad claims of b5 "deliberative process" exemptions to withhold information which is not in fact truly

antecedent to the adoption of an agency policy but merely embarrassing or inconvenient to disclose (*see e.g.*, EPA's expansive b5 withholdings including also inexplicable withholding *in full* hundreds of emails in *CEI v EPA*, D.C.C. CV:12-1617; *Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment*, pp. 25-38, Sept. 11, 2013).

If it is your position that a document contains non-exempt segments and that those non-exempt segments are so dispersed throughout the documents as to make segregation impossible, please state what portion of the document is non-exempt and how the material is dispersed through the document. *See Mead Data Central v. Department of the Air Force*, 455 F.2d at 261. Further, we request that you provide us with an index of those documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1972), with sufficient specificity "to permit a reasoned judgment as to whether the material is actually exempt under FOIA" pursuant to *Founding Church of Scientology v. Bell*, 603 F.2d 945, 959 (D.C. Cir. 1979), and "describ[ing] each document or portion thereof withheld, and for each withholding it must discuss the consequences of supplying the sought-after information." *King v. Department of Justice*, 830 F.2d at 223-24.

**Claims of non-segregability must be made with the same practical detail as required for claims of exemption in a *Vaughn* index.** If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

**Satisfying this Request contemplates providing copies of documents, in electronic format if you possess them as such, otherwise photocopies are acceptable.**



Please provide responsive documents in complete form, without any deletions or other edits and with any appendices or attachments.

Request for Fee Waiver

**This discussion is as detailed as it is as a result of our recent experience of agencies, particularly EPA, improperly using denial of fee waivers to impose an economic barrier to access, an improper means of delaying or otherwise denying access to public records, despite our history of regularly obtaining fee waivers. We are not alone in this experience.<sup>3</sup>**

- 1) Disclosure would substantially contribute to the public at large's understanding of governmental operations or activities, on a matter of demonstrable public interest**

CEI requests waiver or reduction of all costs pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) ("Documents shall be furnished without any charge...if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of government and is not primarily in the commercial interest of the requester"); see also 40 C.F.R. §2.107(l), and (c).

The information sought in this request is not sought for a commercial purpose. Requester is organized and recognized by the Internal Revenue Service as a 501(c)3 educational organization (not a "Religious...Charitable, Scientific, Literary, Testing for Public Safety, to Foster National or International Amateur Sports Competition, or Prevention of Cruelty to

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<sup>3</sup> See February 21, 2012 letter from public interest or transparency groups to four federal agencies requesting records regarding a newly developed pattern of fee waiver denials and imposition of "exorbitant fees" under FOIA as a barrier to access, available at <http://images.politico.com/global/2012/03/acluefffeewvrfoialtr.pdf>; see also *National Security Counselors v. CIA* (CV: 12-cv-00284(BAH), filed D.D.C Feb. 22, 2012); see also "Groups Protest CIA's Covert Attack on Public Access," *OpentheGovernment.org*, February 23, 2012, <http://www.openthegovernment.org/node/3372>.



Children or Animals Organization[']”). With no possible commercial interest in these records, an assessment of that non-existent interest is not required in any balancing test with the public’s interest.

As a non-commercial requester, CEI is entitled to liberal construction of the fee waiver standards. 5 U.S.C.S. § 552(a)(4)(A)(iii), *Perkins v. U.S. Department of Veterans Affairs*, 754 F. Supp. 2d 1 (D.D.C. Nov. 30, 2010). Specifically, the public interest fee waiver provision “is to be liberally construed in favor of waivers for noncommercial requesters.” *McClellan Ecological Seepage Situation v. Carlucci*, 835 F. 2d 1284, 2184 (9th Cir. 1987). The Requester need not demonstrate that the records would contain any particular evidence, such as of misconduct. Instead, the question is whether the requested information is likely to contribute significantly to public understanding of the operations or activities of the government, period. *See Judicial Watch v. Rosotti*, 326 F. 3d 1309, 1314 (D.C. Cir 2003).

FOIA is aimed in large part at promoting active oversight roles of watchdog public advocacy groups. “The legislative history of the fee waiver provision reveals that it was added to FOIA ‘in an attempt to prevent government agencies from using high fees to discourage certain types of requesters, and requests,’ in particular those from journalists, scholars and nonprofit public interest groups.” *Better Government Ass’n v. State*, 780 F.2d 86, 88-89 (D.C. Cir. 1986) (fee waiver intended to benefit public interest watchdogs), citing to *Ettlinger v. FBI*, 596 F. Supp.

867, 872 (D.Mass. 1984); SEN. COMM. ON THE JUDICIARY, AMENDING THE FOIA, S. REP. NO. 854, 93rd Cong., 2d Sess. 11-12 (1974)).<sup>4</sup>

Congress enacted FOIA clearly intending that “fees should not be used for the purpose of discouraging requests for information or as obstacles to disclosure of requested information.”

*Ettlinger v. FBI*, citing Conf. Comm. Rep., H.R. Rep. No. 1380, 93d Cong., 2d Sess. 8 (1974) at

8. Improper refusal of fees as a means of withholding records from a FOIA requester constitutes improper withholding. *Ettlinger v. FBI*.

Given this, “insofar as ...[agency] guidelines and standards in question act to discourage FOIA requests and to impede access to information for precisely those groups Congress intended to aid by the fee waiver provision, they inflict a continuing hardship on the non-profit public interest groups who depend on FOIA to supply their lifeblood -- information.” *Better Gov’t v. State* (internal citations omitted). The courts therefore will not permit such application of FOIA requirements that “‘chill’ the ability and willingness of their organizations to engage in activity that is not only voluntary, but that Congress explicitly wished to encourage.” *Id.* As such, agency implementing regulations may not facially or in practice interpret FOIA’s fee waiver provision in a way creating a fee barrier for Requester.

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<sup>4</sup> This was grounded in the recognition that the two plaintiffs in that merged appeal were, like Requester, public interest non-profits that “rely heavily and frequently on FOIA and its fee waiver provision to conduct the investigations that are essential to the performance of certain of their primary institutional activities -- publicizing governmental choices and highlighting possible abuses that otherwise might go undisputed and thus unchallenged. These investigations are the necessary prerequisites to the fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions.” *Better Gov’t v. State*. They therefore, like Requester, “routinely make FOIA requests that potentially would not be made absent a fee waiver provision”, requiring the court to consider the “Congressional determination that such constraints should not impede the access to information for appellants such as these.” *Id.*



“This is in keeping with the statute’s purpose, which is ‘to remove the roadblocks and technicalities which have been used by . . . agencies to deny waivers.’” *Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Educ.*, 593 F. Supp. 261, 268 (D.D.C. 2009), citing to *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987)(quoting 132 Cong. Rec. S16496 (Oct. 15, 1986) (statement of Sen. Leahy).

Requester’s ability to utilize FOIA -- as well as many nonprofit organizations, educational institutions and news media who will benefit from disclosure -- depends on its ability to obtain fee waivers. For this reason, “Congress explicitly recognized the importance and the difficulty of access to governmental documents for such typically under-funded organizations and individuals when it enacted the ‘public benefit’ test for FOIA fee waivers. This waiver provision was added to FOIA ‘in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests,’ in a clear reference to requests from journalists, scholars and, most importantly for our purposes, nonprofit public interest groups. Congress made clear its intent that fees should not be utilized to discourage requests or to place obstacles in the way of such disclosure, forbidding the use of fees as “‘toll gates” on the public access road to information.’” *Better Gov’t Ass’n v. Department of State*.

As the *Better Government* court also recognized, public interest groups employ FOIA for activities “essential to the performance of certain of their primary institutional activities -- publicizing governmental choices and highlighting possible abuses that otherwise might go undisputed and thus unchallenged. These investigations are the necessary prerequisites to the fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions.” That is true in the instant matter as well.



Indeed, CEI is precisely the sort of group the courts have identified in establishing this precedent.

Courts have noted FOIA's legislative history to find that a fee waiver request is likely to pass muster "if the information disclosed is new; supports public oversight of agency operations, including the quality of agency activities and the effects of agency policy or regulations on public health or safety; or, otherwise confirms or clarifies data on past or present operations of the government." *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d at 1284-1286.

This information request meets that description, for reasons both obvious and specified.

**The subject matter of the requested records specifically concerns identifiable operations or activities of the government.** The requested records relate to high-level promises by the President of the United States and the Attorney General to be "the most transparent administration, ever." This spawned widespread media coverage and then of the reality of the administration's transparency efforts, as well as numerous transparency-oriented groups reporting on this performance, to further media coverage (see, e.g., and internet search of "study Obama transparency").

Particularly this directly relates to EPA's treatment of similarly situated parties under FOIA but particularly undersigned after requester's recent discoveries FOIA and publication of record-management and electronic communication practices, and other efforts to disseminate the information, the public, media and congressional oversight bodies are very interested in how widespread are the violations of this pledge of unprecedented transparency.

Disparate treatment of requesting parties, as appears to be an ongoing practice at EPA and which we are now exploring as a public policy group as well as media outlet (see, *infra*), is further in line with this ongoing public discussion.

Potentially responsive records reflecting Agency practice in granting or denying fee waivers -- viewed another way, of imposing fee barriers on certain among otherwise similarly situated parties -- unquestionably reflect "identifiable operations or activities of the government." The Department of Justice Freedom of Information Act Guide expressly concedes that this threshold is easily met. There can be no question that this is such a case. Regardless, these records inescapably reflect how EPA HQ treated all FOIA requesters over a recent period, a governmental operation and activity.

**Disclosure is "likely to contribute" to an understanding of specific government operations or activities because the releasable material will be meaningfully informative in relation to the subject matter of the request.** The disclosure of the requested documents have an informative value and are "likely to contribute to an understanding of Federal government operations or activities" just as did various studies of public records reflecting on the administration's transparency, returned in the above-cited search "study obama transparency", and the public records themselves that were released to those groups, contributed to public understanding of specific government operations or activities: this issue is of significant and increasing public interest, in large part due to the administration's own promises and continuing claims, and revelations by outside groups accessing public records.

This list of fee waiver treatment over approximately eight months will contribute to the public debate just as did EPA's provision of a list, covering a longer period, to other requesters; this period captures the time over which EPA's Inspector General inquiry was initiated and the initial interview process concluded. It is therefore clear that the requested records are "likely to contribute" to an understanding of your agency's decisions because they are not otherwise accessible other than through a FOIA request.

**The disclosure will contribute to the understanding of the public at large, as opposed to the understanding of the requester or a narrow segment of interested persons.**

**The disclosure will contribute to the understanding of the public at large, as opposed to the understanding of the requester or a narrow segment of interested persons.**

CEI intends to post these records for public scrutiny and otherwise to broadly disseminate the information it obtains under this request by the means described, herein. CEI has spent years promoting the public interest advocating sensible policies to protect human health and the environment, routinely receiving fee waivers under FOIA (until recently, but even then on appeal) for its ability to disseminate public information. Further, as demonstrated herein and in the above litany of exemplars of newsworthy FOIA activity, requester and particularly undersigned counsel have an established practice of utilizing FOIA to educate the public, lawmakers and news media about the government's operations and, in particular, have brought to light important information about policies grounded in energy and environmental policy, like



EPA's,<sup>5</sup> specifically in the past year-plus relating to transparency and electronic record use and preservation practices.

EPA did not exact fees for CEI's requests for FOIA fee waiver determinations (EPA-HQ-2013-004176) the same reasons it cannot now, and also for all reasons stated herein.

Requester intends to disseminate the information gathered by this request via media appearances (the undersigned appears regularly, to discuss his work, on national television and

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<sup>5</sup> See, e.g., Stephen Dinan, "Do Text Messages from Feds Belong on Record? EPA's Chief's Case Opens Legal Battle", *Washington Times*, April 30, 2011, at A1. Other outlets covering this dissemination include Peter Foster, "More Good News for Keystone", *National Post*, Jan. 9, 2013, at 11; Juliet Eilperin, "EPA IG Audits Jackson's Private E-mail Account", *Washington Post*, December 19, at A6; James Gill, "From the Same Town, But Universes Apart", *New Orleans Times-Picayune*, Jan. 2, 2013, at B1; Kyle Smith, "Hide & Sneak", *New York Post*, Jan. 6, 2013, at 23. <http://www.breitbart.com/Big-Government/2013/01/27/EPA-email-Scandal-worse-than-originally-thought>; <http://www.breitbart.com/Big-Government/2013/01/14/epa-lisa-jackson-emails>; <http://www.breitbart.com/Big-Government/2013/02/22/EPA-Releases-Doc-Dump-Of-Black-Papers-On-Former-Chief-s-Alternative-E-Mail-Account>; Christopher C. Horner, EPA Circles Wagons in 'Richard Windsor' Email Scandal, Jan. 16, 2013, <http://www.breitbart.com/Big-Government/2013/01/16/What-s-in-a-Name-EPA-Goes-Full-Bunker-in-Richard-Windsor-EMail-Scandal>. See also, Stephen Dinan, "EPA Staff to Retrain on Open Records; Memo Suggests Breach of Policy," *Washington Times*, April 9, 2013, at A4; Stephen Dinan, "Suit Says EPA Balks at Release of Records; Seeks Evidence of Hidden Messages," *Washington Times*, April 2, 2013, at A1; Christopher C. Horner, "EPA administrators invent excuses to avoid transparency", *Washington Examiner*, Nov. 25, 2012, <http://washingtonexaminer.com/epa-administrators-invent-excuses-to-avoid-transparency/article/2514301>.



national and local radio shows, and regularly on the radio shows “Garrison” on WIBC

Indianapolis and the nationally syndicated “Battle Line with Alan Nathan”).<sup>6</sup>

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<sup>6</sup> To avoid EPA’s pattern of unsupportedly denying undersigned’s requests for fee waiver we provide an extensive if still not exclusive list of evidence of our intention, practice and ability to broadly disseminate information obtained from FOIA requests: Written Statement of Hans Bader, U.S. House of Representatives Committee on Oversight and Government Reform, Subcommittee on Regulatory Affairs, Stimulus Oversight and Government Spending Hearing Entitled Lasting Implications of the General Motors Bailout, June 22, 2011, <http://www.scribd.com/doc/58462911/Hans-Bader-Statement-for-Regulatory-Affairs-Subcommittee>; Hans Bader, Obama Administration Knew for Weeks That GM Would Make Fraudulent Claims, Examiner.com, June 2, 2011, <http://www.examiner.com/article/obama-administration-knew-for-weeks-that-gm-would-make-fraudulent-claims>; Christine Hall, Delayed Release of Auto Bailout Documents by Treasury Dept. Reveals Cozy PR Relationship: Agency Coughs Up Material on Eve of Obama Administration Hoopla, Press release, Competitive Enterprise Institute, June 2, 2011, <http://cei.org/news-releases/delayed-release-auto-bailout-documents-treasury-dept-reveals-cozy-pr-relationship> (this document is also available in Westlaw from the State News Service); Nicole Ciandella, CEI FOIA Request Reveals Relationship Between Treasury Department and GM, Open Market (Competitive Enterprise Institute blog), June 3, 2011, <http://www.openmarket.org/2011/06/03/cei-foia-request-reveals-relationship-between-treasury-department-and-gm/>; Hans Bader, Recently-Released Documents Reveal Obama Administration’s Complicity in Deception about Auto Bailout, Global Warming.Org (CEI blog), June 2, 2011, <http://www.globalwarming.org/2011/06/02/recently-released-documents-reveal-obama-administration%E2%80%99s-complicity-in-deception-about-auto-bailout/>; Lee Doren, Hearing Today Will Shed Light on Negative Implications of General Motors Bailout, Press Release, Competitive Enterprise Institute, June 22, 2011, <http://cei.org/news-releases/hearing-today-will-shed-light-negative-implications-general-motors-bailout>; Hans Bader, Obama Administration Flouts FOIA Law, *Washington Examiner*, March 18, 2011, pg. 26; Stephen Dinan, “Researcher: NASA hiding climate data”, *Washington Times*, A1, December 3, 2009, <http://www.washingtontimes.com/news/2009/dec/03/researcher-says-nasa-hiding-climate-data/?page=all>; <http://wattsupwiththat.com/2012/08/21/noaa-releases-tranche-of-foia-documents-2-years-later/>; <http://legaltimes.typepad.com/blt/2010/05/foia-suit-seeks-nasas-global-warming-data-.html>; <http://legaltimes.typepad.com/blt/2010/05/page/2/>; <http://legaltimes.typepad.com/blt/2010/11/global-warming-foia-suit-against-nasa-heats-up-again.html>.

See also, [http://www.cbsnews.com/8301-504383\\_162-5314040-504383.html](http://www.cbsnews.com/8301-504383_162-5314040-504383.html); [http://www.cbsnews.com/8301-504383\\_162-5322108-504383.html](http://www.cbsnews.com/8301-504383_162-5322108-504383.html); <http://www.foxnews.com/scitech/2011/12/16/complicit-in-climategate-doe-under-fire/>; <http://www.foxnews.com/scitech/2011/12/16/complicit-in-climategate-doe-under-fire/>; <http://news.investors.com/ibd-editorials/031210-527214-the-big-wind-power-cover-up.htm?p=2>; <http://wattsupwiththat.com/2012/10/04/the-secret-ipcc-stocker-wg1-memo-found/>.

Requester also publishes materials based upon its research via print and electronic media, as well as in newsletters to legislators, education professionals, and other interested parties.<sup>7</sup> For a list of exemplar publications, please see <http://cei.org/publications>. Those activities are in fulfillment of CEI's mission. *We intend to broadly disseminate the information gathered by this request to the public at large and at no cost through one or more of the following:* (a) newsletters; (b) opinion pieces in newspapers or magazines; (c) CEI's websites, which receive approximately 150,000 monthly visitors (appx. 125,000 unique);<sup>8</sup> (d) in-house publications for public dissemination; (e) other electronic journals, including blogs to which our professionals contribute; (f) local and syndicated radio programs dedicated to discussing public policy; (g) to the extent that Congress or states engaged in relevant oversight or related legislative or judicial activities find that which is received noteworthy, it will become part of the public record on deliberations of the legislative branches of the federal and state governments on the relevant

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<sup>7</sup> See *EPIC v. DOD*, 241 F.Supp.2d 5 (D.D.C. 2003) (court ruled that the publisher of a bi-weekly electronic newsletter qualified as the media, entitling it to a waiver of fees on its FOIA request); *Forest Guardians v. U.S. Dept. of Interior*, 416 F.3d 1173, 1181-82 (10th Cir. 2005) (fee waiver granted for group that "aims to place the information on the Internet"; "Congress intended the courts to liberally construe the fee waiver requests of noncommercial entities").

<sup>8</sup> See, e.g., [www.openmarket.org](http://www.openmarket.org) (one of several blogs operated by CEI providing daily coverage of legal and regulatory issues); [www.globalwarming.org](http://www.globalwarming.org) (another CEI blog).



issues. CEI also is regularly cited in newspapers,<sup>9</sup> law reviews,<sup>10</sup> and legal and scholarly publications.<sup>11</sup>

With a foundational, institutional interest in and reputation for its leading role in the relevant policy debates and expertise in the subject of transparency, energy- and environment-related regulatory policies CEI unquestionably has the “specialized knowledge” and “ability and intention” to disseminate the information requested in the broad manner, and to do so in a manner that contributes to the understanding of the “public-at-large.”

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<sup>9</sup> See, FN 5, *supra*. See also e.g., Al Neuharth, “Why Bail Out Bosses Who Messed It Up,” *USA Today*, Nov. 21, 2008, at 23A (quotation from Competitive Enterprise Institute) (available at 2008 WLNR 22235170); Bill Shea, “Agency Looks Beyond Criticism of Ads of GM Boasting About Repaid Loan,” *Crain’s Detroit Business*, May 17, 2010, at 3 (available at 2010 WLNR 10415253); Mona Charen, Creators Syndicate, “You Might Suppose That President Obama Has His Hands ...,” *Bismarck Tribune*, June 10, 2009, at A8 (syndicated columnist quoted CEI’s OpenMarket blog); Hal Davis, “Earth’s Temperature Is Rising and So Is Debate About It,” *Dayton Daily News*, April 22, 2006, at A6 (citing CEI’s GlobalWarming.Org); *Washington Examiner*, August 14, 2008, pg. 24, “Think-Tanking” (reprinting relevant commentary from OpenMarket); Mark Landsbaum, “Blogwatch: Biofuel Follies,” *Orange County Register*, Nov. 13, 2007 (citing OpenMarket) (available in Westlaw news database at 2007 WLNR 23059349); *Pittsburgh Tribune-Review*, “Best of the Blogs,” Oct. 7, 2007 (citing OpenMarket) (available in Westlaw news database at 2007 WLNR 19666326).

<sup>10</sup> See, e.g., Robert Hardaway, “The Great American Housing Bubble,” 35 *University of Dayton Law Review* 33, 34 (2009) (quoting Hans Bader of CEI regarding origins of the financial crisis that precipitated the TARP bailout program).

<sup>11</sup> See, e.g., Bruce Yandle, “Bootleggers, Baptists, and the Global Warming Battle,” 26 *Harvard Environmental Law Review* 177, 221 & fn. 272 (citing CEI’s GlobalWarming.Org); Deepa Badrinarayana, “The Emerging Constitutional Challenge of Climate Change: India in Perspective,” 19 *Fordham Environmental Law Review* 1, 22 & fn. 119 (2009) (same); Kim Diana Connolly, “Bridging the Divide: Examining the Role of the Public Trust in Protecting Coastal and Wetland Resources,” 15 *Southeastern Environmental Law Journal* 1, 15 & fn. 127 (2006) (same); David Vanderzwaag, *et al.*, “The Arctic Environmental Protection Strategy, Arctic Council, and Multilateral Environmental Initiatives,” 30 *Denver Journal of International Law and Policy* 131, 141 & fn. 79 (2002) (same); Bradley K. Krehely, “Government-Sponsored Enterprise: A Discussion of the Federal Subsidy of Fannie Mae and Freddie Mac,” 6 *North Carolina Banking Institute* 519, 527 (2002) (quoting Competitive Enterprise Institute about potential bailouts in the future).

**The disclosure will contribute “significantly” to public understanding of government operations or activities.** We repeat here by reference the arguments above from the discussion of how disclosure is “likely to contribute” to an understanding of specific government operations or activities.

After disclosure of these records, the public’s understanding of this unexplored aspect to the now highly controversial claims of executive branch and administration transparency, how otherwise similarly situated parties are treated for fee waiver purposes, will inherently be significantly enhanced. The requirement that disclosure must contribute “significantly” to the public understanding is therefore met.

**As such**, the requester has stated “with reasonable specificity that its request pertains to operations of the government,” and “the informative value of a request depends not on there being certainty of what the documents will reveal, but rather on the requesting party having explained with reasonable specificity how those documents would increase public knowledge of the functions of government.” *Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Health and Human Services*, 481 F. Supp. 2d 99, 107-109 (D.D.C. 2006).

**2) Alternately, CEI qualifies as a media organization for purposes of fee waiver**

The provisions for determining whether a requesting party is a representative of the news media, and the “significant public interest” provision, are not mutually exclusive. Again, as CEI is a non-commercial requester, it is entitled to liberal construction of the fee waiver standards. 5 U.S.C.S. § 552(a)(4)(A)(iii), *Perkins v. U.S. Department of Veterans Affairs*. Alternately and only in the event EPA deviates from prior practice on similar requests and refuses to waive our fees under the “significant public interest” test, which we will then appeal while requesting EPA



proceed with processing on the grounds that we are a media organization, we request a waiver or limitation of processing fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii) (“fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by.... a representative of the news media...”) and 40 C.F.R. §2.107(d)(1) (“No search or review fees will be charged for requests by educational institutions...or representatives of the news media.”); see also 2.107(b)(6).

However, we note that as documents are requested and available electronically, there are no copying costs.

Requester repeats by reference the discussion as to its publishing practices, reach and intentions all in fulfillment of CEI’s mission from pages 14-17, *supra*.

The information is of critical importance to the nonprofit policy advocacy groups engaged on these relevant issues, news media covering the issues, and others concerned with Agency activities in this controversial area, or as the Supreme Court once noted, what their government is up to.

For these reasons, requester qualifies as a “representative[] of the news media” under the statutory definition, because it routinely gathers information of interest to the public, uses editorial skills to turn it into distinct work, and distributes that work to the public. *See Electronic Privacy Information Center v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003)(non-profit organization that gathered information and published it in newsletters and otherwise for general distribution qualified as representative of news media for purpose of limiting fees). Courts have reaffirmed that non-profit requesters who are not traditional news media outlets can qualify as representatives of the new media for purposes of the FOIA, including after the 2007



amendments to FOIA. *See ACLU of Washington v. U.S. Dep't of Justice*, No. C09-0642RSL, 2011, 2011 U.S. Dist. LEXIS 26047 at \*32 (W.D. Wash. Mar. 10, 2011). *See also Serv. Women's Action Network v. DOD*, 2012 U.S. Dist. Lexis 45292 (D. Conn., Mar. 30, 2012).

Accordingly, any fees charged must be limited to duplication costs. The records requested are available electronically, as such, there are no duplication costs other than the cost of a compact disc(s).

### CONCLUSION

We expect the agency to release within the statutory period of time all segregable portions of responsive records containing properly exempt information, and to provide information that may be withheld under FOIA's discretionary provisions and otherwise proceed with a bias toward disclosure, consistent with the law's clear intent, judicial precedent affirming this bias, and President Obama's directive to all federal agencies on January 26, 2009. Memo to the Heads of Exec. Offices and Agencies, Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 26, 2009) ("The Freedom of Information Act should be administered with a clear presumption: in the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, or because of speculative or abstract fears).

We request the Agency provide particularized assurance that it is reviewing some quantity of records with an eye toward production on some estimated schedule, so as to establish some reasonable belief that it is processing our request. 5 U.S.C.A. § 552(a)(6)(A)(i). EPA must at least gather, review, and inform a requesting party of the scope of potentially responsive records, including the scope of the records it plans to produce and the scope of documents that it

plans to withhold under any FOIA exemptions. *See Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 188 (D.C. Cir. 2013). FOIA specifically requires EPA to immediately notify CEI with a particularized and substantive determination, and of its determination and its reasoning, as well as CEI's right to appeal; further, FOIA's unusual circumstances safety valve to extend time to make a determination, and its exceptional circumstances safety valve providing additional time for a diligent agency to complete its review of records, indicate that responsive documents must be collected, examined, and reviewed in order to constitute a determination. *See Id.*, at 186 (D.C. Cir. 2013). *See also*, *Muttitt v. U.S. Central Command*, 813 F. Supp. 2d 221; 2011 U.S. Dist. LEXIS 110396 at \*14 (D.D.C. Sept. 28, 2011)(addressing "the statutory requirement that [agencies] provide estimated dates of completion").

We request a rolling production of records in that we request the Agency furnish records to my attention as soon as they are identified, preferably electronically, but as needed then to my attention, at the address below. We inform EPA of our intention to protect our appellate rights on this matter at the earliest date should EPA not comply with FOIA per, *e.g.*, *CREW v. FEC*.

If you have any questions please do not hesitate to contact me.

Respectfully submitted,



Christopher C. Horner, Esq.

1899 L Street NW, Suite 1200  
Washington, DC 20036  
202.262.4458 (M)  
[CHorner@CEI.org](mailto:CHorner@CEI.org)